Supreme Court, U.S.
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No. 93-1579

In The

Supreme Court of the United States

October Term, 1993

DANNY VAUGHAN,

Petitioner,

v.

FIRST NATIONAL BANK OF SHAMROCK, TEXAS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Can a bankruptcy court *sua sponte* modify the automatic stay to allow completion of debtor's state court divorce proceeding?

2. Can a debtor collaterally attack a final, appealable bankruptcy order to modify the automatic stay with an adversary complaint filed some seventeen months after the order was entered?

RULE 29.1 STATEMENT

Neither Smith, Shew & Scrivner, P.C., nor Great Plains Breeders Service, Inc., has parent companies or subsidiaries.

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STATUTES AND RULES

Bankruptcy Code §105(a), 11 U.S.C. §105(a) 1

CITATIONS TO ORDERS DELIVERED IN THE COURTS BELOW

The February 4, 1991, Order of the United States Bankruptcy Court for the Eastern District of Oklahoma is not reported. *See*, App. at 1-2.

STATUTORY PROVISIONS

Bankruptcy Code §105(a), 11 U.S.C. §105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

In October of 1990 Petitioner commenced his bankruptcy case in the United States Bankruptcy Court for the Eastern District of Oklahoma ("Bankruptcy Court") as Case No. 90-71175. At the time he filed his bankruptcy case, Petitioner was also a party to a previously filed divorce proceeding in Wheeler County, Texas. During the course of the bankruptcy proceedings, Petitioner's wife, Crabileigh Vaughan, who was not a debtor in the bankruptcy case, filed an Amendment to List of Exempt Property ("the Amendment") asserting that Petitioner had

failed to file a complete list of exempt property. As determined by the Bankruptcy Court, notice of the hearing on the objections which had been filed to the Amendment was provided to all parties in interest, including Petitioner and his attorney, Jimmy L. Veith ("Veith"). App. at 1. In its Order dated February 4, 1991 (the "Order"), the Bankruptcy Court found that despite proper notice to all interested parties, no appearance was entered on behalf of the debtor, and the Court proceeded to *sua sponte* modify the automatic stay to permit the completion of the pending divorce action in Wheeler County, Texas. A copy of the Order was sent to Petitioner's attorney Veith as well as the other parties in interest, but no appellate proceeding was initiated by any party. *Id.* at 2.

In July of 1992, Petitioner filed an adversary complaint in the Bankruptcy Court against approximately 130 parties alleging, *inter alia*, willful violations of the automatic stay. Petitioner's complaint was dismissed by the Bankruptcy Court because the Court concluded that the automatic stay had been properly modified in order to conclude the divorce action in the Texas state court. Petitioner appealed to the United States District Court for the Eastern District of Oklahoma which affirmed the Bankruptcy Court. The Tenth Circuit affirmed the district court and denied the petition for rehearing. Petitioner now seeks certiorari alleging due process violations.

ARGUMENT

I. THE BANKRUPTCY COURT'S SUA SPONTE MODIFICATION OF THE AUTOMATIC STAY WAS PROPER IN ORDER TO CONCLUDE PETITIONER'S DIVORCE PROCEEDING.

A. Notices to Petitioner

Petitioner's arguments revolve around the alleged lack of notice for a hearing on January 30, 1991, where the Bankruptcy Court *sua sponte* modified the automatic stay to permit the conclusion of, and thus the property division in, Petitioner's divorce proceeding. Petitioner goes on to assert that he was deprived of due process because not only was he not given notice of the January 30 hearing, the order from this hearing was not distributed, which in turn resulted in an *ex parte* divorce proceeding which divested Petitioner of his marital property. In addition to going beyond the record, Petitioner substantially misstates the essential facts.

Chronologically, the record in this case begins with the February 4, 1991, Order which resulted from the January 30 hearing. App. at 1. Although Petitioner recognizes " . . . that a court must rule on an issue that is before the court on the basis of the record presented," Petitioner goes outside the record to describe notice of the January 30 hearing. *Petition* at 12. Petitioner makes repeated references to notice of a previous January 23 hearing and a subsequent notice of cancellation, but fails to advise the Court of the Bankruptcy Court Clerk's notice of the January 30 hearing (filed on January 21, 1991) which includes a certificate of mailing to both Petitioner and his attorney, Jimmy L. Veith ("Veith"). *Petition* at 5 and 10. While all of

these specific notices are beyond the record, the record itself does clearly reflect that proper notice was given.

In the Bankruptcy Court's Order of February 4, 1991, it is specifically noted that "[a]fter review and consideration of the above-referenced pleadings, this Court finds that proper notice was given to all interested parties and that no appearance was entered on behalf of the Debtor [Petitioner]." App. at 1. Clearly, Petitioner's statement that "[n]o subsequent notice was provided to the potentially interested parties to the case, including the debtor," not only misleads the Court but is untrue because, aside from the Bankruptcy Court's finding of proper notice, at least three interested parties entered their appearance at the hearing. *Petition* at 6; App. at 1.

Equally erroneous and misleading is Petitioner's statement that " . . . the Bankruptcy Court had entered an order that was not distributed to the parties in interest by the Clerk . . . " *Petition* at 6. Again, the record reflects that the reverse side of the February 4 Order shows the certification of the Bankruptcy Court deputy clerk that a copy of the order was mailed to the parties in interest, including Petitioner's attorney, Veith. App. at 2.

Also, Petitioner makes several references to the *"ex parte"* divorce proceeding in Texas, implying that he once again failed to receive notice of this hearing. *Petition* at 6 and 10. In addition to this being outside the record, Petitioner is misleading the Court by implying that he did not have notice of the divorce proceeding. Petitioner's divorce decree, a certified copy of which was made a part of the bankruptcy proceeding on September 18, 1991, reflects quite a different set of circumstances:

> On this the 29th day of April, 1991, trial on the merits was held in this cause, . . . and the respondent [Danny Vaughan] having duly filed an Answer and being advised of the setting, did not appear, and his attorney of record advised the Court that said attorney *was directed not to participate in the hearing by the respondent* . . . (emphasis supplied)

Thus, while the divorce trial may be described as an *ex parte* proceeding, it was *ex parte* only in the sense that Petitioner instructed his attorney not to participate.

B. The Bankruptcy Court's *sua sponte* Modification of the Automatic Stay.

Since the automatic stay allows a bankruptcy court to retain control over the resolution of all claims pertaining to the debtor and the bankruptcy estate, once Petitioner filed his bankruptcy case the automatic stay effectively limited the power of the Texas divorce court to proceed in the pending divorce action. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). Whether the stay should be modified is within the sound discretion of the bankruptcy judge. *Id.* In addition, Section 105(a) of the Bankruptcy Code allows a bankruptcy court to *sua sponte* issue any order, process or judgment necessary or appropriate to administer the bankruptcy estate including modification of the automatic stay. *In re Bellucci*, 119 B.R. 763, 778-79 (Bankr. E.D. Cal. 1990) (a bankruptcy court may lift the automatic stay *sua sponte*, notwithstanding the language of 11 U.S.C. §362(d) that permits a party in interest to seek such relief).

When Mrs. Vaughan filed her Amendment to List of Exempt Property and other parties in interest raised objections, the Oklahoma Bankruptcy Court was being asked to rule on exemptions for residential and business homesteads, vehicles, and household goods as permitted under Texas law. Rather than make those determinations under unfamiliar Texas community property and exemption law, the Bankruptcy Court properly deferred to the Texas divorce court's expertise on those issues. *In re White*, 851 F.2d 170, 173 (6th Cir. 1988) (the bankruptcy court did not abuse its discretion in lifting the stay to allow the state court divorce action to proceed). Accordingly, the Court of Appeals properly found that the Bankruptcy Court did not abuse its discretion when it *sua sponte* modified the automatic stay to allow Petitioner's divorce action to proceed.

II. THE BANKRUPTCY COURT ORDER OF FEBRUARY 4, 1991, WAS A FINAL, APPEALABLE ORDER AND CANNOT NOW BE COLLATERALLY CHALLENGED WITH DUE PROCESS DEFECTS.

Even assuming *arguendo* that notice of the January 30 hearing was either not sent or was insufficient to advise Petitioner that the automatic stay might be modified or even that the Bankruptcy Court improperly modified the stay on its own motion, Petitioner was given notice of the court's action when the court clerk sent a copy of the February 4 Order to attorney Veith. App. at 2. Since an order granting relief from the automatic stay is a final, appealable order, Petitioner should have appealed the Order had he disagreed with it. *In re American Mariner Industries, Inc.*, 734 F.2d 426, 429 (9th Cir. 1984) (decisions

of the bankruptcy courts granting or denying relief from the automatic stay under section 326(d) are final decisions reviewable by the court of appeals). Instead, Petitioner took no action and now seeks to collaterally attack the Order by urging the Order was defective because of the lack of due process notice. Petitioner's failure to timely appeal the February 4, 1991, Order is fatal to now being able to raise that issue in an adversary complaint filed seventeen months after the Bankruptcy Court entered its Order.

CONCLUSION

The Bankruptcy Court properly modified the automatic stay in order to conclude Petitioner's divorce proceeding. Moreover, in the event the stay was improperly modified, the Bankruptcy Court Order of February 4, 1991, was a final, appealable order and cannot now be collaterally challenged with due process defects. Accordingly, the Petition for a Writ of Certiorari to the United

States Court of Appeals for the Tenth Circuit should be summarily denied.

Respectfully Submitted,

D. Craig Shew; Smith, Shew & Scrivner, P.C.; Crabileigh Vaughan; and, Great Plains Breeders Service, Inc.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
DANNY VAUGHAN	)	Case No. 90-71175
461-02-2515	)	Chapter 7
dba Shamrock Vet Clinic	)	
dba Texhoma Analystical Lab	)	
	)	
Debtor.	)	

ORDER

(Filed Feb. 4, 1991)

On the 30th day of January, 1991, the Objection to Claim of Exemptions filed by First National Bank (Docket Entry #20) and Objection to Amendment to List of Exempt Property filed by the Trustee (Docket Entry #24), came before this Court for hearing. Appearances were entered by James C. Fling on behalf of First National Bank, D. Craig Shew on behalf of Crableigh Vaughn and William Mark Bonney, the Chapter 7 Trustee.

After review and consideration of the above-referenced pleadings, this Court finds that proper notice was given to all interested parties and that no appearance was entered at the hearing on behalf of the Debtor.

IT IS THEREFORE ORDERED that the above-referenced Objections are hereby **DENIED**.

IT IS FURTHER ORDERED that the Court sua sponte modifies the Automatic Stay to permit the conclusion of the pending divorce action in Wheeler County District Court in Texas.

IT IS FURTHER ORDERED that the parties are allowed fifteen (15) days after the final Order is entered in the divorce action in which to renew their Objections.

DATED this 1st day of February, 1991.

/s/ James E. Ryan
JAMES E. RYAN
United States Bankruptcy
Judge

CERTIFICATE OF MAILING

The undersigned clerk of the United States Bankruptcy Court for the Eastern District of Oklahoma, hereby certifies that a copy of the document on which this certificate appears was mailed to all parties in interest herein as required by the Bankruptcy Code and Rules of Bankruptcy Procedure.

DATED: 2-4-91

Fling, Shew, Bonney & Veith
Deputy Clerk
TC

BEST AVAILABLE COPY